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**IN THE
COURT OF APPEALS OF INDIANA**

FRANCIS LAMARR SIMS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 45A03-0610-CR-488

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Kathleen Sullivan, Judge Pro Tempore
Cause No. 45G03-0312-FA-48

September 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Frances Sims appeals his conviction in a bench trial and sentence for four counts of rape, as class A felonies; one count of rape, as a class B felony; three counts of criminal deviate conduct, as class A felonies; one count of criminal deviate conduct, as a class B felony; four counts of robbery, as class B felonies; one count of attempted robbery, as a class B felony; five counts of criminal confinement, as class B felonies; two counts of carjacking, as class B felonies; and one count of battery, as a class C felony.

We affirm.

ISSUES

1. Whether the trial court erred in admitting evidence.
2. Whether the trial court erred in conducting a bench trial based upon stipulated evidence.
2. Whether the trial court erred in sentencing Sims.

FACTS

At approximately 6:45 a.m. on January 30, 2002, D.C. left her Gary home and went to her vehicle, which was parked in the alley behind her home. As D.C. approached her vehicle, she noticed a man—later identified as Sims—standing by her neighbor’s garage. Sims was wearing a black ski cap and a “black bandanna across his nose and mouth.” (Tr. 71). Frightened, D.C. started walking back to her house. Sims, however ran toward D.C., pointed a gun at her, told her not to scream and asked who else was in her house.

Sims then took D.C.'s bag and car keys and forced her to get in her vehicle. Sims got in the driver's seat of the vehicle and drove it to another alley, where "he pulled up close to a garage and parked." (Tr. 72). Sims then told D.C. to move to the back seat, which she did, while he went through her bag. At one point, while they were in the vehicle, Sims grabbed D.C.'s glasses off her face and hit her in the back of her head. Sims hit D.C. once more because D.C. "wasn't moving fast enough for him." (Tr. 85). Sims then drove to another area, where he made D.C. get out of the vehicle.

Sims forced D.C. into an abandoned house and directed her into a bedroom, which contained "a box springs and mattress" (Tr. 79). Sims then told D.C. "to get naked." (Tr. 79). As D.C. did as she was told, Sims began "throwing pillows down on the mattress." (Tr. 80). Sims also "put something white over [D.C.'s] head . . . and put something else on [her] eyes," so that she could not see. (Tr. 81). Sims then ordered D.C. to get on her knees and perform oral sex on him, which D.C. did.

After a short time, Sims ordered D.C. to lie down, "hold up [her] legs," and "grab his penis and put it in the hole." (Tr. 81). D.C. protested, saying "no and stop it," making Sims angry. Fearful, D.C. eventually acquiesced. After "a short period of time," Sims stopped and said, "See, that didn't take long." (Tr. 81).

Sims then returned D.C.'s keys to her and left the house. After Sims left, D.C. put on her clothes, left the house and drove away in her vehicle. As soon as D.C. saw some people outside, she asked them to telephone the police. Officers from the Gary Police Department responded and took D.C. to Gary Methodist Hospital.

On January 16, 2000, detectives from the Gary Police Department took a statement from S.F. S.F. reported that at approximately 6:00 a.m. on January 7, 2000, she left her house in Gary and was walking toward her vehicle when she saw a “dark skinned guy with a scarf around his face and a machete in his hand.” (State’s Ex. 3). The man—subsequently identified as Sims—grabbed S.F.’s purse out of her hand and asked who else was in the house. S.F. replied that her husband was home. Sims then took S.F. toward S.F.’s vehicle and asked for her keys. At that point, S.F. broke away from Sims and began running. When S.F. fell, Sims caught up with her and told her to not try that again or he would kill her.

Grabbing S.F. by her coat, Sims took her to her vehicle, made her open the door and get in the vehicle. Sims followed S.F. into the vehicle, started the vehicle and drove to a parking lot. While holding the machete, Sims forced S.F. out of the vehicle and into an abandoned building.

Once inside the building, Sims ordered S.F. to get undressed, get on her knees, and perform oral sex on him. S.F. obeyed. Sims then told S.F. to lie down and proceeded to insert his penis into S.F.’s vagina. Once done, Sims said it “wasn’t bad” and told S.F. to get dressed. (State’s Ex. 3). As S.F. dressed, Sims went through the items in her purse and searched her pockets, taking S.F.’s cash. Sims let S.F. take the rest of her things and leave. S.F. fled to her car and drove home.

On June 9, 2000, detectives from the Gary Police Department took a statement from E.M. E.M. reported that at approximately 4:30 a.m. on May 30, 2000, E.M. was leaving for work. As she unlocked her car door, she felt something on the side of her

head. E.M. heard a man—later identified as Sims—tell her to give him her money and “hit the ground” or he would “blow[] [her] brains out.” (State’s Ex. 4). After “a few minutes,” Sims told E.M. to get in her vehicle. Sims got in the driver’s seat and drove around until he stopped in an alley, by a garage. Sims ordered E.M. to get out of the car and to take her purse with her. Sims then took E.M. into what appeared to be an abandoned house.

Once Sims and E.M. entered a back room, Sims ordered E.M. to undress and make a pallet with her clothes. Sims then made E.M. lie down on the pallet, on her stomach. Sims asked E.M. when she had last “had a good f***ing,” and told her that “he was going to give [her] one.” (State’s Ex. 4). Sims began fondling E.M. When Sims “couldn’t do anything,” he put his penis in E.M.’s mouth and told her “to suck on that.” (State’s Ex. 4). Sims then went behind E.M. and forced his penis into E.M.’s vagina.

Once Sims finished, he instructed E.M. to not move for thirty seconds or he “would blow [her] brains out.” (State’s Ex. 4). After E.M. heard Sims leave the house, she got dressed, left the house and found her vehicle in the alley. E.M. drove herself to the hospital.

On March 27, 2003, detectives from the Gary Police Department took a statement from E.A. E.A. reported that at approximately 5:30 a.m. on January 31, 2001, she went to her vehicle, which was parked in her driveway. E.A. started the engine and began scraping ice off the windshield. A man—later identified as Sims—suddenly appeared from around the corner of E.A.’s house. Sims was wearing dark clothing, including a dark-colored ski mask, and held a gun in his right hand. Sims told E.A. not to scream and

asked who was still in the house. E.A. replied that her husband and two grandchildren were home.

Sims then made E.A. get in her vehicle and move to the passenger seat. Sims got in the driver's seat, told E.A. to put her head down backed down the driveway. Sims drove the vehicle, stating that he wanted to "warm up." (State's Ex. 2). Sims eventually stopped in an alley, next to a garage. Sims exited the vehicle and ordered E.A. to do the same as he grabbed her arm. Sims led E.A. down the alley and into a garage. After making E.A. sit down, Sims went through her purse, taking E.A.'s money. Sims then made E.A. leave the garage with him and walk to an abandoned house. When E.A. asked to be let go, Sims hit her in the back of her head with his gun.

After Sims forced E.A. into the house, he told her to undress, telling E.A., "'If you don't want to get killed, you'll do it.'" (State's Ex. 2). Once E.A. had undressed, Sims told her "to get down on the floor on [her] knees." (State's Ex. 2). Sims then removed his clothing and put his penis in E.A.'s vagina.

Once Sims ejaculated, he got dressed. Sims threw E.A.'s clothes and keys at her, told her to stay there for twenty minutes and then left the house. E.A. left shortly after and fled home. Later, E.A. went to the hospital.

On November 13, 2003, detectives from the Gary Police Department took a statement from N.A., regarding an incident that occurred on March 17, 2002. N.A. reported that at approximately 3:00 a.m., she arrived at her home in Gary and parked her vehicle in front of her apartment house. After she exited her vehicle, a man—later identified as Sims—approached her. Sims was wearing a black coat, sweatpants and

black hat, which covered his face. Sims had a gun in his hand and told N.A. to put up her hands and drop everything. Sims then put the gun to N.A.'s head and went through N.A.'s pockets, taking her money and keys. Sims ordered N.A. to go with him.

Sims and N.A. walked approximately one block to an abandoned house. Sims made N.A. go in the house and "walked through the house like he had been there before." (State's Ex. 1). Once inside, Sims told N.A. to get undressed. When N.A. refused, Sims hit her in the face with the gun, saying "'Bitch don't play with me cause I'll kill you.'" (State's Ex. 1). Sims again told N.A. to get undressed, and N.A. complied. As she undressed, Sims ordered N.A. to perform oral sex on him. After N.A. refused, Sims asked whether she ever wanted to see her children again or whether she wanted to die. N.A. performed oral sex on Sims while Sims held the gun to her head. After three or four minutes, Sims told N.A. to lie down. Sims then placed his penis in N.A.'s vagina and "started pumping on [her]." (State's Ex. 1).

Once Sims finished, he told N.A. to put on her clothes and said "it wasn't that bad." (State's Ex. 1). Sims told N.A. not to leave the house. He then put his gun in his coat pocket and left the house. Approximately two minutes later, N.A. walked back to her home. N.A.'s cousin telephoned the Gary Police Department and took N.A. to Gary Methodist Hospital.

In 2003, following his conviction for criminal confinement and residential entry, Sims submitted a DNA sample with a buccal¹ swab, which was entered into the Indiana

¹ Buccal is defined as "of, relating to, near, involving, or supplying a cheek[.]" Merriam-Webster Dictionary at <http://www.intelihealth.com/buccal> (Aug. 9, 2007).

DNA database. Subsequently, the Indiana State Police Laboratory compared the DNA evidence taken from N.A., D.C., E.A., S.F. and E.M. to the DNA profiles contained in the DNA database. The DNA profiles from the samples collected from N.A., D.C., E.A., S.F. and E.M. were found to be consistent with Sims's DNA profile.

Accordingly, the State, without objection, obtained a court order for a sample of Sims's blood to be drawn. On September 30, 2004, the Indiana State Police Laboratory received from Detective Cooros the blood sample obtained from Sims for comparison to the DNA evidence obtained from N.A., D.C., E.A., S.F. and E.M. Tests confirmed that the DNA evidence taken from N.A., D.C., E.A., S.F. and E.M. matched Sims' DNA.

Stemming from the attack on N.A., the State had already charged Sims with Count 1, rape, as a class A felony; Count 2, criminal deviate conduct, as a class B felony; Count 3, confinement, as a class B felony; Count 4, robbery, as a class B felony; and Count 5, battery, as a class C felony, under cause number 45G03-0312-FA-00048 on December 24, 2003. On January 5, 2004, the State amended Count 2 to criminal deviate conduct, as a class A felony and filed an amended information, alleging Sims to be an habitual offender. The State filed additional charges against Sims under cause numbers 45G03-0310-FA-00042, 45G03-0310-FA-00041, 45G03-0309-FA-00030 and 45G03-0401-FB-00002.

On June 9, 2005, the State and Sims entered into a plea agreement, whereby Sims agreed to plead guilty to four counts of rape, as class A felonies, and the State agreed to dismiss all remaining charges. The trial court, however, finding "certain conditions in the plea . . . objectionable," did not accept the plea agreement. (Tr. 28).

On August 21, 2006, the trial court granted the motion filed by the State and Sims to consolidate the causes. Thus, on August 28, 2006, the State filed an amended information, consolidating the charges filed in cause numbers 45G03-0310-FA-00042, 45G03-0310-FA-00041, 45G03-0309-FA-00030 and 45G03-0401-FB-00002 under cause number 45G03-0312-FA-00048 and charging Sims with Counts 1 through 4, rape, as a class A felony; Count 5, rape, as a class B felony; Counts 6 through 8, criminal deviate conduct, as a class A felony; Count 9, criminal deviate conduct, as a class B felony; Counts 10 through 13, robbery, as a class B felony; Count 14, attempted robbery, as a class B felony; Counts 15 through 19, confinement, as a class B felony; Counts 20 through 21, carjacking, as a class B felony; and Count 22, battery, as a class C felony. The State also filed an amended information, alleging Sims to be an habitual offender.

The trial court commenced a bench trial on August 22, 2006. Sims moved to suppress any DNA evidence in this case. The trial court denied Sims' motion.

D.C. and Gary Police Department Detective Jon Cooros testified at the trial. Detective Cooros testified that he interviewed D.C., S.F., E.M., E.A. and N.A. and investigated the locations where the offenses had taken place.

The State and Sims stipulated that if they were called to testify, N.A., E.A., S.F. and E.M. "would testify that they were each forced to engage in sexual activity against their will with an unknown African American male" and that their testimony would be consistent with the statements they gave to detectives with the Gary Police Department. (Stip. 1). The trial court admitted the statements of N.A., E.A., S.F. and E.M. into evidence without objection.

The State and Sims also stipulated to the following facts:

- D.C., E.A., S.F. and E.M. “presented themselves to hospital personnel” at Gary Methodist Hospital; “each one submitted to the taking of bodily samples in preparation of a sexual assault kit”; and that the samples collected were submitted to Detective Debra Walden of the Gary Police Department” (Stip. 3);
- Detective Walden collected the samples taken from N.A., D.C., E.A., S.F. and E.M. at Gary Methodist Hospital and transported them to the Indiana State Police Laboratory;
- the Indiana State Police Laboratory received from Detective Walden sexual assault kits containing vaginal washes from N.A., D.C., E.A., S.F. and E.A.;
- the Indiana State Police Laboratory extracted seminal material from the vaginal washes performed on S.F. and E.M. and extracted DNA “consistent with an unknown male contributor” (Stip. 18);
- the Indiana State Police Laboratory sent the samples obtained from N.A., D.C. and E.A. to Orchid Cellmark Laboratory for testing and received the samples from Orchid Cellmark Laboratory upon completion of the tests;
- Orchid Cellmark Laboratory tested the samples taken from N.A., D.C. and E.A.;
- “the sperm fraction of the vaginal wash” obtained from N.A., D.C. and E.A. “was consistent with the DNA profile of an untested male (Stip. 15);
- on September 30, 2004, Carol McConnell, a phlebotomist, drew two vials of blood from Sims, which were sealed, secured and given to Detective Cooros, who transported the vials of blood to the Indiana State Police Laboratory;
- a DNA analyst with the Indiana State Police Laboratory analyzed and compared the DNA profile extracted from Sims’ blood sample, compared it with the DNA extracted from the vaginal washes obtained from N.A., D.C., E.A., S.F., E.M. and found that the DNA profiles matched, with Sims being the source of the DNA from all

five vaginal washes “to a reasonable degree of certainty”; (Stips. 23-27; State’s Exs. 12-16).

On August 29, 2006, Sims renewed his motion to suppress, which the trial court denied, and the State moved to withdraw the habitual offender allegations, which the trial court granted. The trial court then found Sims guilty of all remaining counts.

The trial court ordered a pre-sentence investigation report (“PSI”) and held a sentencing hearing on September 19, 2006. In sentencing Sims, the trial court considered the elevated risk that Sims will commit another crime, the nature and circumstances of the crimes committed, Sims’s character and Sims’s prior criminal history. The trial court found Sims’ willingness to plead guilty and “spare the victims the necessity of testifying in front of a jury by stipulating to their statements in the bench trial” to be a mitigating circumstance. (Tr. 161).

The trial court sentenced Sims to fifty years on Counts 1 through 4 and Counts 6 through 8; twenty years on Counts 10 through 13, Counts 15 through 18 and Count 20; ten years on Counts 5, 9, 14, 19, and 21; and eight years on Count 22. The trial court ordered that the sentences for Counts 1 through 5 and Counts 9, 14, 19 and 21 be served consecutively, with the remaining sentences to be served concurrent to those sentences and each other, for a total executed sentence of 250 years.

Additional facts will be provided as necessary.

DECISION

1. Admission of Evidence

Sims asserts that the trial court erred by admitting the DNA evidence in this case. Specifically, Sims argues that the taking of a DNA sample for inclusion in the DNA database pursuant to Indiana Code section 10-13-6-10² violated his right to be free from unreasonable search and seizure under the Fourth Amendment to the United States Constitution.

Sims did not raise this issue at trial. Rather, he asserted that the comparison of his DNA to that taken from the victims invaded his right to privacy.³ Failure to raise an issue before the trial court waives that issue for appellate review. *Van Winkle v. Nash*, 761 N.E.2d 856, 859 (Ind. Ct. App. 2002). Waiver notwithstanding, Sims's argument fails.

The admission of evidence is a matter left to the sound discretion of the trial court, and a reviewing court will reverse only upon an abuse of that discretion. *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Id.* "We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling." *Lundquist v. State*, 834 N.E.2d 1061, 1067 (Ind. Ct. App. 2005). "However, we must also consider the uncontested evidence favorable to the defendant." *Id.*

² Indiana Code section 10-13-6-10 provides, in pertinent part, that a person convicted of a felony offense against a person or of burglary after June 30, 1996, shall provide a DNA sample to the Department of Correction.

³ As to the comparison of Sims's DNA, "the comparison of a DNA profile with other DNA evidence from a database does not violate the Fourth Amendment" and does not constitute a search or seizure under the Indiana Constitution." *Smith v. State*, 744 N.E.2d 437, 439 (Ind. 2001).

In *Balding v. State*, 812 N.E.2d 169 (Ind. Ct. App. 2004), this court addressed whether the compulsory collection of DNA samples for inclusion in the DNA database violates the Fourth Amendment prohibition on unreasonable searches and seizures. In that case, we found that it did not because 1) the collection of DNA samples falls within the “special needs” exception to the Fourth Amendment; 2) the reasonable expectation of privacy of a convicted offender is greatly reduced; 3) the intrusion into the defendant’s privacy by taking a buccal swab is minimal; and 4) the State has a substantial interest in creating the DNA database. 812 N.E.2d 172-73. Given the facts in this case, we also find no Fourth Amendment violation.⁴

2. Stipulated Evidence

Sims asserts that “the trial court committed reversible error in allowing [Sims] to be tried based upon stipulations and reference to trial exhibits because it converted the proceedings into a nolo contendere plea hearing.”⁵ Sims’s Br. 10. Sims argues that by allowing stipulated evidence, “the trial court essentially conducted a guilty plea hearing where Sims still maintained his innocence.” Sims’s Br. 11.

Stipulations are looked upon with favor as a means of simplifying and expediting litigation. A stipulation that a particular witness would, if

⁴ Sims also argues that the taking of a DNA sample violated Article 1, Section 11 of the Indiana Constitution. Sims, however, fails to develop a separate argument regarding this issue. Thus, Sims has waived this issue. See *Bonner v. State*, 776 N.E.2d 1244, 1251 (Ind. Ct. App. 2002) (stating that a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record), *trans. denied*.

⁵ A nolo contendere plea is “[a] plea by which the defendant does not contest or admit guilt.” BLACK’S LAW DICTIONARY 1189 (8th ed. 2004). “Nolo contendere pleas are not permitted in Indiana.” *Corbin v. State*, 713 N.E.2d 906, 907 (Ind. Ct. App. 1999), *trans. denied*. Because Indiana requires an admission of the crime charged when a defendant pleads guilty, “it is reversible error for the trial court to accept a guilty plea when the defendant maintains his innocence.” *Id.*

called, testify in a particular way neither constitutes an admission that such testimony is true, nor forecloses impeachment by the defendant. Stipulated evidence is entitled only to be accorded the same weight by the trier of fact as if given by the witnesses themselves in open court. The use of stipulated evidence does not prevent the parties from arguing what the facts are and what inferences those facts reasonably support.

Accordingly, there is nothing improper with stipulating to expected testimony. Moreover, the stipulation to certain facts in no way transforms a trial into a guilty plea hearing.

Corbin v. State, 713 N.E.2d at 908 (internal citations and footnote omitted).

Furthermore, Sims was not tried entirely on stipulated evidence as both D.C. and Detective Cooros testified. *See id.* at 908 (finding that the bench trial was not transformed into a nolo contendere plea hearing where defendant objected to the introduction of certain exhibits). Accordingly, we find no error in allowing stipulated evidence.

3. Sentence

Sims asserts the trial court abused its discretion in imposing enhanced sentences of fifty years for each class A felony rape conviction and ordering that those sentences be served consecutive to each other.⁶ Sims argues that the trial court gave improper weight to his prior criminal history as an aggravating circumstance and failed to give adequate weight to his stipulation to certain evidence as a mitigating circumstance.

We review a trial court's sentencing decision for an abuse of discretion. *Edmonds v. State*, 840 N.E.2d 456, 461 (Ind. Ct. App. 2006), *trans. denied, cert. denied*, 127 S. Ct.

⁶ The statutory sentencing range for a class A felony was twenty to fifty years, with the presumptive sentence being a fixed term of thirty years. I.C. § 35-50-2-4. Subsequent to the date of Sims' offenses and prior to the date of his sentencing, the legislature amended Indiana Code section 35-50-2-4 to provide for an "advisory" rather than a "presumptive" sentence. *See* P.L. 71-2005, § 7 (eff. Apr. 25, 2005).

497 (2006). “The trial court’s sentencing discretion includes determining whether to increase the sentence, to impose consecutive sentences on multiple convictions, or both.” *Id.* We give great deference to a trial court’s determination of the proper weight to assign a circumstance. *Dunlop v. State*, 724 N.E.2d 592, 597 (Ind. 2000), *reh’g denied*.

a. *Aggravating circumstance*

Sims maintains that the trial court assigned too much weight to his prior criminal history because “the prior history is not that closely related to his convictions for rape” Sims’ Br. 13. We disagree.

“The significance of a criminal history ‘varies based on the gravity, nature and number of prior offenses as they relate to the current offense.’” *Morgan v. State*, 829 N.E.2d 12, 15 (Ind. 2005) (quoting *Wooley v. State*, 716 N.E.2d 919, 929 n.4 (Ind. 1999)). Thus, the weight of a defendant’s criminal history shall be “measured by the number of prior convictions and their seriousness, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant’s culpability.” *Id.*

In this case, the PSI showed that Sims had five juvenile adjudications: three for burglary, one for theft and one for conversion. As an adult, Sims had five previous convictions: one for attempted robbery, as a class B felony, in 1980; two for auto theft, as class D felonies, in 1992 and 1997; one for residential entry, as a class D felony, in 2003; and one for criminal confinement, as a class D felony, in 2003. Sims also violated parole on at least two occasions.

Clearly, Sims' criminal history is significant. Sims' prior convictions consist of several felonies, including felony offenses against a person. Furthermore, several of these convictions were not remote in time. Given the nature and the number of Sims' prior offenses, his criminal history was sufficient to support his sentence.

b. *Mitigating circumstance*

Sims further maintains that the trial court "did not afford the appropriate weight to Sims' agreement to proceed to a trial by stipulations." Sims' Br. 13. Sims, however, fails to provide an argument or citation to authority regarding this issue. Therefore, Sims has waived this issue. *See Bonner*, 776 N.E.2d at 1251. Waiver notwithstanding, Sims' argument fails.

"A sentencing court need not agree with the defendant as to the weight or value to be given to a proffered mitigating factor." *Edmonds*, 840 N.E.2d at 462. A trial court's determination of the proper weight to be given a mitigating circumstance "is entitled to great deference and will be set aside only upon a showing of a manifest abuse of discretion." *Dunlop*, 724 N.E.2d at 597. In this case, we find nothing in the record to support Sims' contention that the trial court abused its discretion in considering and weighing Sims' cooperation.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.